Petition

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No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

BIAGIO PINTO a/k/a BOB PINTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that a federal criminal defendant is not subjected to double jeopardy and denied due process of law, in violation of the Fifth Amendment to the Constitution, when, following reversal by the court of appeals of defendant's conviction for one offense and affirmance of conviction for a separate and independent offense, the district court on remand increased the sentence on the surviving offense from five years' probation to a prison term of two years plus a fine of $5,000.

2. Whether, the court of appeals properly held that, following affirmance of a federal criminal defendant's conviction by the court of appeals, a district court has power to vacate a final and valid sentence in order to impose a more severe penalty.

3. When a federally insured bank transmits funds entirely as a result of its own unilateral mistake, in the absence of any agreement with the recipient to create an expectation of reimbursement, does an "advance" occur within the meaning of 18 U. S. C. 1014, which prohibits false statements or reports in connection with loan or credit applications?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are those named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra*, A1-A2) is not yet reported. The district court's bench opinion, also not reported (30a-44a),[1] is reproduced in Appendix C hereto (App. C, *infra*, A5-A14).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1982 (App. A, *infra*, A1). A timely petition for rehearing in banc was denied by an order entered on April 16, 1982 (App. B, *infra*, A3). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

1. Citations to pages with the suffix "a" refers to Appellant's Appendix in the court below. A copy has been filed with this Court.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *, nor be deprived of life, liberty, or property, without due process of law.

2. Section 1014 of Title 18 of the United States Code is as follows:

> **§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance**
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by

the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

3. Section 2106 of Title 28 of the United States Code is as follows:

Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

4. Federal Rule of Criminal Procedure 35 is as follows:

Rule 35. Correction or Reduction of Sentence

(a) **Correction of Sentence.**—The court may correct an illegal sentence at any time and may correct a

sentence imposed in an illegal manner within the time provide herein for the reduction of sentence.

(b) **Reduction of Sentence.**—The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT

A. Increase in Petitioner's Sentence

Two years ago, the Solicitor General requested this Court to decide that a federal criminal defendant's sentence for one offense can be increased following reversal of the defendant's sentence on an interdependent count. This Court, noting that the contention had not been considered by the court below, refused to express an opinion on whether such a disposition would be permissible. *Busic v. United States*, 446 U. S. 398, 412 n. 19 (1980).

In this case, the courts below held that petitioner's final and valid sentence can be increased following affirmance of his conviction where the court of appeals had reversed petitioner's conviction for another offense. The questions posed in this case are ripe for review. Unlike *Busic*, the offenses in this case are separate and independent. Thus, the constitutional questions are presented even more sharply than they were when the government requested action in that case.

This federal criminal prosecution began with a three-count indictment (3a). One count survives. The jury found petitioner not guilty on a charge of wire fraud under 18 U. S. C. 1343 (1a). The Court of Appeals for the Third Circuit, on defendant's appeal, reversed the conviction for bank larceny under 18 U. S. C. 2113(b) on the ground that the facts did not make out that crime. *United States v. Pinto*, 646 F. 2d 833 (3d Cir.), *cert. denied*, 102 S. Ct. 94 (1981). The surviving part of the case is a conviction on a charge under 18 U. S. C. 1014 that petitioner had made false statements to influence an FDIC-insured bank upon an "advance."

In the Third Circuit's opinion, that court included a suggestion to the government that it might apply to the

district court for resentencing. As indicated, that court reversed petitioner's conviction on a charge of bank larceny on the ground that the evidence wholly failed to prove an offense. The trial court had sentenced petitioner to a five-year prison term for bank larceny; the court of appeals of course vacated that sentence along with the conviction. In the conclusion of its opinion, the court of appeals *sua sponte*, said that the case would be remanded—

> . . . so that the prosecution may apply for resentencing with respect to Count 2, in light of the reversal of the conviction and sentence on Count 1.

646 F. 2d at 838.

In a petition to this Court for certiorari, petitioner sought review of the propriety of the court of appeals suggestion to the prosecution regarding resentencing. The government opposed the petition on the main ground that the question was not ripe "because the district court has not yet determined whether he should be resentenced. . . . If the district court leaves the Section 1014 sentence unchanged, petitioner's claim will be moot. In these circumstances, this Court's review of the instant petition would be premature." (Brief for the United States in Opposition, Oct. Term 1980, No. 80-2110, p. 4). The government informed this Court that the district court in *Busic* had declined to increase those defendants' sentences and argued: "the same outcome is possible here, and that possibility alone dictates denial of the present petition." (*Id.* at 5 n. 3). This court denied certiorari. *Pinto v. United States*, 102 S. Ct. 94 (1981).

On remand to the district court, the prosecution filed an application for resentencing (8a-10a). However, the trial court (Huyett, D.J.) did *not* leave the original sen-

tence unchanged but imposed a sentence of imprisonment for two years and a fine of $5,000 (83a, 86a). The Court of Appeals for the Third Circuit (Aldisert, Van Dusen, and Garth, C.JJ.) affirmed (App. A, *infra*, A1).

B. Petitioner's Conviction Under 18 U. S. C. 1014

There is full agreement as to the facts relied upon to support petitioner's conviction of a violation of § 1014, as stated in the 1981 opinion of the court below:

> Defendant Pinto was the president of Pinto Trucking Service, Inc. ("PTS"). On June 5, 1974, Nissin Unyn Soko ("Nissin"), a Japanese customer of PTS, instructed its bank in Japan, the Sanwa Bank Limited ("Sanwa Bank"), to remit $193.51 to PTS to satisfy a business debt. Sanwa Bank did so by sending a telex communication to its correspondent bank in the area, Philadelphia National Bank ("PNB").
>
> On June 6, 1974, PNB received the telex from the Sanwa Bank. In processing it, however, PNB mistakenly interpreted the telex to be a transmission of $193,511. Unaware of its mistake, PNB notified PTS and asked that firm how it wished to have the $193,511. handled. PTS, through its comptroller, requested that PNB deposit the funds in the PTS account at First Pennsylvania Banking and Trust Company ("First Pennsylvania"). PNB did so.
>
> Subsequently, Pinto, as president of PTS, drew checks on the corporation's account to pay its creditors. By the end of July 1974, the account, including the $193,511. deposit, was completely exhausted.
>
> Meanwhile, PNB had not yet discovered its error. On July 31, 1974, PNB received a form letter from the Sanwa Bank stating that Sanwa did not recognize the $193,511. charge. PNB responded routinely and pro-

vided the Sanwa Bank with the data necessary to trace the transaction.

On September 23, 1974, PNB received an "urgent" letter from the Sanwa Bank stating that the June 6, 1974, transmittal for the PTS account was $193.51, not $193,511. PNB reviewed the cable, finally realized its mistake, immediately called PTS to inform it of the error, and demanded repayment of the difference. The comptroller at PTS responded that he would investigate the matter and report back as soon as possible.

On September 27, 1974, an independent auditor at PTS called PNB. He reported that defendant Pinto had assured him PTS had invoices for the $193,511. and that PTS was entitled to the money. PNB again verified the telex mistake with the Sanwa Bank, sent copies of the verification to the attorney for PTS, and demanded repayment. On October 2, 1974, the PTS attorney responded, stating that PTS still believed it was entitled to the money.

By mid-October 1974, PTS acknowledged that the remittance was a mistake and commenced negotiations with PNB to repay the money. The negotiations proved fruitful and PTS reimbursed the bank for the overpayment by the end of 1978.

646 F. 2d at 834-835 (footnotes omitted).

The court of appeals held these facts sufficient to sustain conviction under § 1014. *United States v. Pinto*, 646 F. 2d 833 (3d Cir.), *cert. denied*, 102 S. Ct. 94 (1981). On petitioner's second appeal, following the increase in the sentence for this offense, the court below held that its earlier decision was the law of the case (App. A, *infra*, A1-A2).

A related case, also involving the interpretation of § 1014, is pending on writ of certiorari granted by the Court. *United States v. Williams*, 102 S. Ct. 565 (1981). Oral argument was heard on April 20, 1982. When the court of appeals below held that petitioner had violated § 1014, it cited a Fifth Circuit decision that, like *Williams*, was based on a check citing scheme, *United States v. Payne*, 601 F. 2d 1215 (5th Cir. 1979). See *United States v. Pinto*, 646 F. 2d 833.

REASONS FOR GRANTING THE PETITION

1. The Interpretation of the Fifth Amendment by the Court Below Is in Conflict With Decisions of This Court and of All Other Courts of Appeals.

A. The Decision of the Court Below Is in Conflict With Decisions of Every Other Court of Appeals on the Same Matter.

The decision by the Third Circuit in this case, approving an increase in the severity of petitioner's sentence following his unsuccessful appeal from conviction, upsets a thoroughly litigated and well-settled pattern of cases that include the considered judgments of every court of appeals in the country. Repeatedly and insistently, courts of appeals have held that the Double Jeopardy Clause bars district courts from increasing the severity of final and valid sentences.

Citation to only the most recent decisions of the circuit courts is sufficient to demonstrate the solidity of this interpretation of the Fifth Amendment. **First Circuit:** *United States v. Bynoe,* 562 F. 2d 126 (1st Cir. 1977); *Pugliese v. United States,* 353 F. 2d 514 (1st Cir. 1965); **Second Circuit:** *United States v. Sacco,* 367 F. 2d 368 (2d Cir. 1966); **Fourth Circuit:** *Whaley v. North Carolina,* 379 F. 2d 221 (4th Cir. 1967); **Fifth Circuit:** *Chandler v. North Carolina,* 468 F. 2d 834 (5th Cir. 1972); **Sixth Circuit:** *United States v. Adams,* 362 F. 2d 210 (6th Cir. 1966); **Seventh Circuit:** *United States v. Turner,* 518 F. 2d 14 (7th Cir. 1975); **Eighth Circuit:** *United States v. Durbin,* 542 F. 2d 486 (8th Cir. 1976); **Ninth Circuit:** *United States v. Edick,* 603 F. 2d 772 (9th Cir. 1979); *United States v. Best,* 571 F. 2d 484 (9th Cir. 1978); *Kennedy v. United States,* 330 F. 2d 26 (9th Cir. 1964); **Tenth Circuit:** *Owensby v. United States,* 385 F. 2d 58 (10th Cir. 1967);

District of Columbia Circuit: *United States v. Frady*, 607 F. 2d 383 (D. C. Cir. 1979); *Borum v. United States*, 409 F. 2d 433 (D. C. Cir. 1967), *cert. denied*, 395 U. S. 916 (1969).

Prior to the decision of the court below, the Third Circuit was in agreement with the other circuit courts. *United States v. Fredenburgh*, 602 F. 2d 1143 (3d Cir. 1979); *United States v. Benedetto*, 558 F. 2d 171 (3d Cir. 1977); *Government of the Virgin Islands v. Henry*, 533 F. 2d 876 (3d Cir. 1976); *United States v. Corson*, 449 F. 2d 544 (3d Cir. 1971) (in banc); *United States v. Welty*, 426 F. 2d 615 (3d Cir. 1970).

In the court below, the government argued, and the court held that this solid set of precedents was completely undermined in 1980 when this Court decided *United States v. DiFrancesco*, 449 U. S. 117 (1980). There, this Court upheld a provision in the Organized Crime Control Act of 1970 that allowed the government to take an appeal from sentence in the case of a dangerous special offender. 18 U. S. C. 3576. The holding of that case has no application here: No statute (or rule) authorizes government appeal from sentence in this case. The process in this case was entirely different. On remand from appeal, after the court of appeals had reversed petitioner's conviction for one offense and affirmed conviction on another, the government successfully moved the district court to resentence on the surviving offense. There is no authority for the government's motion or for the district court's action. Thus *DiFrancesco's* upholding of a federal statute permitting government appeal from sentence in one specific crime has no direct pertinence to this case.

The government relies on *DiFrancesco*, not for its holding, but for discussion in the opinion of prior decisions of this Court applying the Double Jeopardy Clause to sentencing problems. The opinion of the Court, by

Justice Blackmun, said that dictum in *United States v. Benz*, 282 U. S. 304, 307 (1931), had overstated the holding in *Ex parte Lange*, 18 Wall. 163 (1874), and confined the dictum in *Benz* to the specific context in *Lange*. 449 U. S. at 138-139. The opinion of the Court does not diminish the holding of *Lange*; rather that decision is reaffirmed. Although *DiFrancesco* made no reference to any of the precedents of the courts of appeals cited above, the government contends that all of them were overruled by this Court's restatement of the *Benz* dictum.

The opinion of this Court in *DiFrancesco supports* the line of authority in the decisions of the courts of appeals. This Court found that the Double Jeopardy Clause, as applied to sentencing, gives rise to an expectation by defendants of finality of their sentences. In the statutory setting of the *DiFrancesco* case, Congress had specifically provided that sentence is subject to appeal. Thus, held the Court, the normal expectation of finality did not arise. "Under such circumstances there can be no expectation of finality in the original sentence. . . . The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and, accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange*." 449 U. S. at 139.

Neither the holding nor the discussion in the opinion of *DiFrancesco* support the government's position. Neither justify the action of the court below in overturning the long settled rule. The Double Jeopardy Clause is violated when, without notice, petitioner's final and valid sentence was increased in severity on the government's motion for resentencing following appeal.

Within the limits of a petition for a writ of certiorari, complete argument on the merits is not proper. It is enough to demonstrate that the constitutional questions

here involved were not settled by *DiFrancesco*. See, e.g., *Ralston v. Robinson*, 102 S. Ct. 233, 246-247 (1981) (views of Justices Stevens, Brennan, and O'Connor). Departure from the interpretation of the Fifth Amendment that has been fixed for more than a century should not be considered except by this Court after the matter has been briefed and argued for plenary consideration.

In *Busic v. United States*, 446 U. S. 398 (1980), this Court expressly withheld judgment when the Solicitor General requested the Court to consider the power of a court of appeals to vacate a sentence in order to increase its severity. *Id.* at 412 n. 19. The underlying problem in *Busic*, while apparently similar in certain formal respects to the issue here, is distinguishable. *Busic* was one of a number of recent cases in which prosecutors had improperly sought enhancement of the sentence for federal crimes by invoking 18 U. S. C. 924(c). That provision authorizes enhancement of sentence when a defendant has been convicted of a felony involving the use or carrying of a weapon. It is entirely dependent upon conviction of a predicate felony. For technical reasons, an indictment citing § 924(c) will have the predicate felony in one count and the enhancement charge in another count. However, there would be only one offense, the predicate felony, with two penalty provisions. Acquittal of the felony would terminate prosecution on both counts. The two counts are thus interlocking as a matter of law.

Two years ago, in *Busic*, this Court held that it was improper to invoke § 924(c) because, in the statute defining the predicate felony in that case, Congress had provided for enhancement of sentence if the crime were committed under aggravating circumstances. As sentenced, the defendants had received less than the maximum terms permitted for the predicate felonies plus consecutive sentences under § 924(c). On remand to the Third Circuit,

with the § 924(c) portion of the sentences vacated, the court of appeals held that the district court had power to resentence the defendant for the predicate felony. The issue in the § 924(c) cases is unique and plainly distinguishable from the ordinary prosecution of a defendant for two or more offenses permissibly joined in one proceeding under Federal Rule of Criminal Procedure 8(a). The court of appeals for the Second Circuit, in another § 924(c) case, expressly so held:

> Consecutive sentences were mandatory in this case under section 924(c) and the sentences were truly interdependent. Therefore, what we have said above in no way is addressed to a situation involving concurrent or non-interlocking sentences. Where the sentencing judge could have insured against invalidation of a longer term by imposing a higher sentence for the other offense, vacatur of the shorter term might well be inappropriate under 28 U. S. C. § 2106, and imposition of a higher term on resentencing would pose a more difficult double-jeopardy problem than does this case.

McClain v. United States, — F. 2d — (2d Cir., No. 81-1438, April 14, 1982). These § 924(c) cases, involving split punishments for a single crime, provide no parallel to the action of the court below.

Compare the present case. This case did not involve a single offense,[2] and the sentence as imposed on each of *the* two convictions were totally legal. Neither is a pro-

2. In this case the trial court properly charged the jury—"Each charge and the evidence pertaining to it should be considered by you separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged shall not control your verdict as to any other of the offenses charged." (Appellant's Appendix, No. 79-133, p. 497a, filed in the court of appeals.)

vision for enhanced punishment for an aggravated form of a basic offense. The statutes involved are wholly unrelated sections of the Federal Criminal Code. If petitioner had received consecutive prison sentences on the two counts, there would have been no basis to challenge the aggravated sentence as a matter of law.

The offenses in the indictment were totally separate and independent. The bank larceny charge, under 18 U. S. C. 2113(b), was based on facts that occurred in June and July of 1974. The alleged false statements, on the other hand, were not made until the end of September at the earliest. The events were separated by a period of months. There is nothing inherently improper in charging one defendant with offenses under §§ 2113 and 1014. Each of the counts in this case stands or falls on its own bottom. They are not interdependent.

If a court of appeals can upset one of two lawful sentences under § 2106, in a case involving a conviction on multiple counts, the power asserted is applicable to any lawful sentence.

The gravity of the Double Jeopardy violation in this case is dramatically highlighted if one considers what the district court would have said to petitioner, at the time of the original sentence, if the court then had given notice of what would happen if the defendant should be partially successful on appeal. Having sentenced petitioner for the bank larceny offense, the court would have said to the defendant: "If you do not appeal the bank larceny conviction, or if you appeal and the court of appeals affirms that conviction, then sentence for the false statements offense is suspended and you are placed on probation for five years. However, if you appeal the bank larceny conviction and the court of appeals reverses my judgment on that offense, then the sentence for the false statements offense will be a two-year prison term and a fine of $5,000."

Of course, such clear notice, in advance, of what the court would do if defendant exercised his right to appeal is plainly unconstitutional. That it is so unacceptable shows conclusively that the action, done entirely without notice to the defendant, is also plainly unconstitutional.

B. The District Court Action Increasing the Severity of the Sentence Imposed on Petitioner Is in Conflict With This Court's Decision in North Carolina v. Pearce, 395 U. S. 711 (1969).

When a defendant is properly resentenced for an offense, the Due Process Clause requires that the resentence be no more severe than the original sentence unless the increase can be explained on objective information concerning a defendant's identifiable conduct occurring *after* the original sentence. *North Carolina v. Pearce*, 395 U. S. 711 (1969). The constitutional limits laid down by this Court in *Pearce* were drawn in a case in which the original conviction has been reversed and thereafter the defendant has been retried and reconvicted. Those constitutional limits apply *a fortiori* when, as in this case, the original conviction is undisturbed and the sentencing court merely resentenced the defendant to a more severe penalty than had been fixed previously in a final and valid sentence.

The government's only response to *Pearce* is that the district court, for purposes of resentencing, is entitled to borrow the sentence imposed on the bank larceny conviction, reversed by the court of appeals and use the bank larceny sentence to set the *Pearce* ceiling for a totally independent offense.[3] Of course, the government is un-

3. The government has yet to explain how the borrowing theory would justify the fine imposed by the court for the § 1014 offense inasmuch as the original sentence for bank larceny had not included any fine. Plainly the district court did not think that it was constrained by the previous sentence for bank larceny.

able to find any support for this brazen logic in any prior decision of this Court or any lower court. The constitutional right found by this Court in *Pearce* will be made essentially meaningless unless the sentences imposed for one offense are kept separate and distinct from sentences imposed for other independent offenses.

North Carolina v. Pearce would not prevent a court that had imposed a sentence of probation from revoking that order and imposing a fine and prison sentence if a defendant is found to have violated the terms of probation since the imposition of this original sentence. That is not what occurred in this case. The government did not and could not move for revocation of probation on any theory. Unless a probation order is violated, it is a final and valid judgment that entitles petitioner to the Due Process protection of *Pearce*. See *Korematsu v. United States*, 319 U. S. 432 (1943); *United States v. DeLeo*, 644 F. 2d 300 (3d Cir. 1981); *United States v. Bynoe*, 562 F. 2d 126 (1st Cir. 1977).

The decision of the court below is directly in conflict with this Court's holding in *Pearce*. The matter should be resolved by this Court through allowance of the petition for writ of certiorari.

2. The Actions of the Courts Below, Extending the Sentencing Power Beyond That Permitted by Federal Rule of Criminal Procedure 35, Is in Conflict With the Decisions of Other Courts of Appeals and Poses an Important Question of Federal Law That Has Not Been, But Ought to Be Settled by This Court.

The fundamental questions presented by this case are constitutional in nature, violations of the Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment. The decisions of the courts below give rise to these

basic issues because those courts ignored the clear limits on the power of a district court to entertain motions for change in final and valid sentences. Rule 35 of the FEDERAL RULES OF CRIMINAL PROCEDURE is the controlling provision on the scope of a district court's powers in this connection. Paragraph (a) of that rule allows a district court to correct an illegal sentence at any time. Paragraph (b) explicitly covers the power of district courts when cases are remanded from courts of appeals. Within 120 days after receipt of a mandate issued upon affirmance of the judgment, a district court may reduce a sentence. The courts below utterly ignored Rule 35. Had the district court complied with Rule 35, it would have found the government's motion for resentencing to be unauthorized. On appeal, the court of appeals should have held that the district court was bound by Rule 35.

Observation of procedural limits on the power of district courts to alter sentences is a means of avoiding actions that cause constitutional problems. Constitutional constraints apply to content of the second sentences. The procedural constraints apply to the power of district courts to entertain motions to resentence. This distinction was clearly drawn by the Court of Appeals for the First Circuit, which found Rule 35 controlling. *Pugliese v. United States*, 353 F. 2d 514 (1st Cir. 1965). And see *United States v. Welty*, 426 F. 2d 615 (3d Cir. 1970).

In an effort to meet the question of the power of the district court to entertain a motion to resentence, the government presented a highly ingenious argument in the court below. Implicitly the government conceded that the district court's action violated the terms of Rule 35. Implicitly the government also conceded that there is no other authority, by statute or rule, that permits a district court to entertain such a motion following remand of a case from a court of appeals. The government purported

to find authority for the district court's action in the statute that describes the general powers of federal *appellate* courts, 28 U. S. C. 2106. The government argued that the Third Circuit had delegated *its* power under § 2106 to the district court, and that the district judge, without being apprised of the government's theory, had vacated petitioner's original sentence, without even mentioning that the sentence was being vacated.

Sentences and sentencing are, some would say, the most important aspect of the criminal process. Federal law has provided a level of regularity to the sentencing process that is highly useful in determining when a sentence is final, and when and in what manner final sentences are subject to modification. The procedures for sentencing are not overly intricate or technical. Preservation of the formal procedure incorporated in the RULES OF CRIMINAL PROCEDURE is a valid and important goal, not the least because to do so would avoid court decisions that give rise to serious constitutional questions like those presented here.

3. In Interpreting § 1014 to Reach the Facts of This Case, the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Ought to Be Settled by This Court.

The court below held that the action of a bank, transmitting funds pursuant to an order from a depositor, has made an "advance" to the transferee within the meaning of 18 U. S. C. 1014. In this case, the bank transmitted a larger amount than the depositor had ordered. The mistake was entirely the result of the bank's own unilateral error. Three months after the "advance" the bank discovered its error and began negotiations for return of the excess transmitted. False statements by the transferee during the negotiations, wholly separated in time and function from the events that led to the transmittal, are

the factual premise on which this conviction rests. The court held that these facts show a violation of § 1014 because that section reaches any transaction in which a federally insured bank might sustain a loss.

The court of appeals' interpretation of § 1014 is a truly staggering expansion of the scope of potential federal criminal jurisdiction. Millions of transactions occur every day that expose banks to some possibility of loss. Any of these coupled with a false statement, no matter how far removed from the bank's actions, could become a federal criminal prosecution. Even the ubiquitous overdraft on a checking account would become a federal crime since the writer of the check represents that there are sufficient funds on deposit to cover the draft.

Section 1014, on its face, reveals that it was not intended to reach ordinary payment transactions or transmittals of funds. The title of the section is: "Loan and credit applications generally; renewals of discounts; crop insurance." The plain meaning of the statute is concern for *consensual* transactions creating and executing credit arrangements. Such consensual arrangements give rise to an expectation by the lenders of repayment. Payment transactions, by contrast, involve transfers of funds without expectation by the transferor of reimbursement. Such transferors remit funds already in their possession as a result of previous deposits, as was true in this case. PNB simultaneously reduced the account of the Japanese bank as it carried out what it mistakenly thought to be that bank's instructions. As far as PNB was concerned, its transfer to First Pennsylvania was a "final payment" under § 4-213 of the Uniform Commercial Code. 12A Pa. Stat. Ann. § 4-213 (Purdon's 1970). No expectation of repayment arose.

Three months later, when PNB discovered its error, it pursued a quasi-contractual claim against the transferee.

This claim is not dependent on a previous consensual transaction or any obligation undertaken by a transferee to return a payment made by mistake. See *Bank of Naperville v. Catalano*, 408 N. E. 2d 441, 10 ALR 4th 514 (1981). There is no basis for extending § 1014 to these restitution claims.

Pending before this Court is a case presenting a related question of the scope of § 1014. *United States v. Williams, cert. granted*, 102 S. Ct. 565 (1981), involves a check kiting scheme. Check kiting involves a deliberate effort by the kiter to obtain money improperly from the victim bank. Lower courts have divided on whether this constitutes obtaining an "advance" under § 1014. Compare *United States v. Williams*, 639 F. 2d 1311 (5th Cir. 1981), with *United States v. Sher*, 657 F. 2d 28 (3d Cir. 1981).[4] If this Court holds that a check kiting scheme does not fall within § 1014, then *a fortiori* the transfer of funds by a bank entirely as a result of its own unilateral mistake would be outside the statute. If this Court affirms the Fifth Circuit in *Williams*, the question of the statute's application to this case would remain open.

Given the millions of payment transactions that take place every day, it is manifestly important that the scope of § 1014 be determined promptly. State criminal law fully covers the problems that arise when bank transmittals go awry. There is no indication that the states have been unable to deal with any fraudulent conduct that may occur in such transactions. The court of appeals' unprecedented expansion of the reach of the federal criminal jurisdiction is unnecessary and unwarranted. To preserve a balance of state and federal jurisdiction, it is highly important for this Court to settle the issue presented by this case.

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4. The Solicitor General has filed a petition for writ of certiorari in the *Sher* case. No. 81-1047, filed December 4, 1981.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JACOB KOSSMAN
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Philadelphia, PA 19107
Counsel for Petitioner.

May 1982

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3086

UNITED STATES OF AMERICA

v.

PINTO, BIAGIO a/k/a
Bob Pinto,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 79-00133)

Argued

March 19, 1982

Before: ALDISERT, VAN DUSEN, and GARTH, *Circuit Judges.*

Judgment Order

After considering the contentions raised by appellant, to-wit, that (1) since the district court's probation order of September 8, 1980, has not been and cannot validly be vacated, the court's second sentence for the same offense, imposed on November 2, 1981, is void; that (2) a federal criminal defendant is subjected to double jeopardy and

denied due process of law, in violation of the fifth amendment, when the punishment imposed for an offense, five years probation, is increased to a two year prison term plus a $5,000 fine, following reversal on appeal of defendant's conviction and prison term for a separate and independent offense; and that (3) an "advance" within the meaning of 18 U.S.C. § 1014, which proscribes false statements or reports in connection with loan or credit applications, arises only within consensual transactions in which the parties have created an expectation of reimbursement and does not occur when a bank erroneously transmits funds entirely as a result of its own unilateral mistake;

For the reasons expressed by the United States Supreme Court in *United States v. DiFrancesco,* 449 U.S. 117, 132-38 (1980), and by this court in *United States v. Busic,* 639 F.2d 940 (3d Cir.), *cert. denied,* 101 S.Ct. 3055 (1981), and in recognition of our authority under 28 U.S.C. § 2106, and because as to the substantive issues raised by appellant we are bound by the law of this case as expressed in *United States v. Pinto,* 646 F.2d 833 (3d Cir. 1981); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: Mar. 19, 1982

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3086

UNITED STATES OF AMERICA

v.

PINTO, BIAGIO a/k/a
Bob Pinto,

Appellant

(E.D. Pa. D.C. Crim. No. 79-00133)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and VAN DUSEN, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ ALDISERT
Judge

Dated: Apr. 16, 1982

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. No. 79-00133

UNITED STATES OF AMERICA,

v.

BIAGIO PINTO a/k/a BOB PINTO

EXCERPTS FROM TRANSCRIPT

HUYETT, *D.J.*

[30]

THE COURT: * * * If there is no further comment from counsel, I will rule on the Government's application for resentencing and may I say that I have considered the Government's application for resentencing, the memoranda submitted by the Government and the defendant and the arguments of counsel made today. I am prepared to

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rule on the application.

First, I make the following findings of fact:

1. On September 8, 1980, when I first imposed a sentence of probation under Count 2, a representative of the Probation Office was in the courtroom. That representative was Suzanne T. Feiring, who testified in open court today.

2. At the defendant's request, I continued bail as previously posted. That is, I continued bail on both counts upon which the defendant had been convicted.

3. The continuation of bail was understood by the Probation Department as a stay of the sentence of probation.

4. The defendant has never been considered by the Probation Department as being on probation.

5. The defendant has never executed the usual documents required when a person is placed on probation.

6. The defendant has never been informed of the conditions of probation.

7. The defendant has never been

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told to report on a regular basis to the Probation Office, nor was defendant ever interviewed or assigned a probation officer.

8. The defendant has never inquired of the Probation Office about his status, vis a vis probation or the conditions of probation.

For the following reasons, the Government's application for resentencing is granted:

The defendant was convicted on Counts 1 and 2 of a three-count indictment. At the original sentencing hearing, I sentenced the defendant to a term of five years imprisonment on Count 1 and to probation on Count 2. The defendant appealed his conviction. The Court of Appeals set aside his conviction on Count 1, but let stand the conviction on Count 2.

Since the appellate decision set aside the count upon which I had imposed a prison sentence, the Court of Appeals remanded the case, so that the Government could petition for resentencing and so that I could consider, in the first instance, whether resentencing

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is appropriate.

The constitutional ramifications of the imposition of a second sentence have been considered at some length in analogous situations. The principal cases that concern us are: *United States versus DiFrancesco,* 449 U.S. 117 (1980); *North Carolina versus Pearce,* 395 U.S. 711 (1969); *United States versus Busic,* 639 F. 2d 940 (3d Cir. 1981). These cases recognize that the imposition of a sentence does not have the qualities of constitutional finality that attend an acquittal. For example, if, after the first sentencing, the defendant wins a new trial on appeal, and if he is convicted again at the second trial, the double jeopardy clause does not prohibit the imposition of an increased sentence on the second conviction.

The due process clause does prohibit the imposition of an increased sentence after a second conviction, where there is a vindictive reason for the increase. For this reason, a sentencing judge who imposes a second sentence which is harsher than the first is required to state reasons for doing so. In addition, the reasons must relate to events, facts or

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circumstances unknown to the sentencing judge at the time the first sentence was imposed.

Another context in which the Courts have considered the propriety of resentencing is where without an intervening reversal and retrial, the trial judge calls back a

defendant who has previously been sentenced and imposes a harsher second sentence. The law is clear that if the defendant has not yet begun to serve the first sentence, then the Constitution is not offended by the imposition of a second harsher sentence. Dicta in earlier cases left the impression that the second sentence was constitutionally infirm if the defendant had begun to serve the first sentence. However, in *DiFrancesco,* at 134, the Supreme Court drew back from that earlier dicta. Finally, our Court of Appeals repudiated the position in *Busic* at 948, note 11, stating:

> "There is not double jeopardy objection to altering the sentence even after service of a sentence has begun."

Thus, trial judges have the ability to recall a previously sentenced defendant and

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resentence the defendant where, 1) there is a legitimate reason for doing so; 2) the resentencing takes place with reasonable promptness; and 3) the original sentence has not been completely served.

Our Court of Appeals has called this "settled practice" in the Federal Courts. *Busic* at 948. This is an important tool which permits the Court to correct an erroneous or illegal sentence.

The Supreme Court has held that the practice does not violate the double jeopardy clause, stating:

> "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

DiFrancesco, at 135.

Turning to the facts of the present case, I am faced with a request from the Government that I now increase

the defendant's sentence on Count 2 from probation. It follows from the law discussed above, that the double jeopardy clause is generally not offended by the imposition of an increased sentence, but if an

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increase is imposed after a defendant has exercised his right to appeal, then the reasons for it must be stated and must relate to events, facts or circumstances unknown at the time the first sentence was imposed.

The defendant argues first, that on Count 2, I orally imposed a sentence of probation to begin immediately. Second, that the subsequent written order which provides for probation upon completion of the prison term imposed on Count 1 is immaterial, because oral words of sentence control over written, and therefore, that the defendant has already begun to serve his sentence of probation on Count 2.

While it is true that in the case of an actual conflict, oral words of sentence control over written words, nevertheless, written words can be used to clarify an ambiguous oral sentence. See cases decided in the Government's brief at 2. Secondly, if there was a true variance between the oral and written sentences, Courts considering appeals and collateral matters may be bound by the rule that the oral pronouncement controls, but the

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sentencing judge has the ability to correct the error. This is the holding of the cases previously discussed.

The written judgment is ineffective when it expands the sentence in the absence of the defendant. *United States versus Marquez*, 506 F. 2d 620, 622 (2d Cir. 1974). By bringing defendant into court and resentencing him, the trial judge obviates the flaw in the written judgment.

The gist of the defendant's argument is that since the oral sentence controlled over the written one and since the oral sentence called for probation to begin immediately, the defendant has already begun to serve the sentence. Although the defendant does not say so, the inference is that this Court cannot correct an error in an oral sentence where the defendant has already begun to serve the sentence.

As I previously stated, this argument based upon dicta in earlier decisions is now repudiated in this circuit. Furthermore, it does not appear to me that this defendant has in fact begun to serve his sentence. Assuming that the language, "this date" in my oral

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sentence is a variance from the written language and not simply an unfortunate choice of words, the effectiveness of the language was subsequently stayed.

Under Rule 38 of the Federal Rules of Criminal Procedure, a sentence of imprisonment is automatically stayed pending an appeal. Formerly, the automatic stay applied to sentences of probation, as well. In 1972, an amendment to the Federal Rules of Criminal Procedure changed this rule and the correct rule is that a sentence of probation may be but is not automatically stayed. Whether or not a sentence of probation is stayed is a matter within the discretion of the Court. However, if after a conviction, the Court stays a sentence of probation, the Court must fix conditions for the stay. Generally, the condition is the posting of bail under the Bail Reform Act, 18 U.S.C., Section 3148. See notes of Advisory Committee on Rule 1972 Amendments.

In my view, the sentence of probation on Count 2 was implicitly stayed pending the outcome of the appeal in this case. First, at the request of the defendant's counsel, I

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continued bail not simply on Count 1, but as to the whole case, that is, both counts upon which the defendant had been convicted.

My order of September 9, 1980, prepared by counsel for defendant, provided that defendant:

> "Shall be permitted to remain on bail as previously posted pending appeal."

Secondly, assuming my written order was ineffective, to change the sentence that the defendant would serve, it is still fair to treat the written order as effective for the purpose of tying the probation sentence to the imprisonment sentence, so that the automatic stay of one stayed the other.

Finally, I note that the defendant and his counsel must have understood that the implementation of the oral sentence was stayed because the defendant never reported to the probation authorities or questioned their failure to contact him.

I conclude that I may resentence that defendant on Count 2 and impose a stricter sentence than probation. My reasons for doing

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so are related to circumstances unknown to me at the time I imposed probation; namely, that the count upon which I imposed a sentence of imprisonment could not support a conviction as a matter of law. The imposition of an increased sentence for this reason does not offend due process.

It is perhaps misleading to refer to the sentence I am now imposing on Count 2 as "increased." It is unquestionably harsher than the probation previously imposed

on this count, but it is no stricter than the complete sentence imposed before the defendant appealed his case. In reality, this is not a harsher sentencing at all. The defendant engaged in a reprehensible course of conduct, the proof of which led a jury to convict him on two counts of an indictment. I determined that his culpable conduct warranted the imposition of a five-year prison sentence and a period of probation. I refer the parties to the detailed reasons I stated in open court on September 8, 1980, at the time that sentencing in support of the five-year prison sentence was imposed.

By sheer happenstance, in implementing

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the planned sentence, I imposed the imprisonment term of my sentence on the count that was eventually reversed. It was my intention to impose the interdependent sentences on Count 1 and 2 as stated in the written sentencing order. Our Court of Appeals has recognized that when the District Court imposes interdependent sentences on a multi-count conviction as part of a sentencing plan, a reversal of the conviction on a single count will disturb the plan the District Court intended to follow, and therefore, resentencing is appropriate. *Busic* at 947-48.

The *Busic* decision controls here. It specifically overrules older Third Circuit cases which held resentencing was not possible when a case was in a posture like that of the present case. *Busic* holds that resentencing is appropriate in a case like this one because:

> "To hold otherwise would allow the guilty to escape punishment through legal accident."

639 F. 2d at 950, quoting *Pollard versus U.S.*

Even though the line of reasoning in *Busic* is alone enough to support resentencing,

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there is an alternative ground for my decision.

I find that the oral sentence was ambiguous in the light of all the circumstances, since it included the words, "from this date." In making this finding, I have considered the following:

The language of the written sentence; the fact that in an order drafted by counsel for defendant, dated September 8, 1980, bail was continued as previously imposed on both counts in the same amount; if the continued bail was to include only the term of imprisonment, obviously, counsel for defendant in drafting the bail continuance order could have made that fact clear; defendant never reported to the Probation Office as the defendant is required to do to commence a sentence of probation; defendant never came under the control of the Probation Office, was never picked up on the records of the Probation Office as a defendant serving a sentence of probation, as always is the case when a sentence of probation is served; the variance in the language between the oral pronouncements in court when sentence was imposed and the written sentence was never

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raised by the defendant until the Government very recently petitioned for resentencing and it would appear clear that the variance in language as contended by defendant was simply an afterthought.

As Chief Judge Murrah, who was a very respected authority, observed in *Baca versus U.S.*, 383 F. 2d 154 (1967-10th Cir.):

> "Where the orally pronounced sentence is ambiguous, the judgment and commitment may and should be used to clarify the actual intention of the sentencing judge."

As the written judgment of conviction order in this case demonstrates, it was my intention to impose a sentence of probation under Count 2, to commence upon the expiration of the term of imprisonment imposed on Count 1.

The defendant has raised some other objections which I have considered. I conclude that they are either without merit or have been fully considered by the Court of Appeals. It is not appropriate or desirous that I reconsider these matters.

May I further observe that if I am

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wrong in granting the Government's application for resentencing, I am reminded of what Mr. Bumble said in Dickens' *Oliver Twist*:

> "If the law supposes that, the law is an ass, an idiot."

It may be interesting to refer to George Chapman:

> "Revenge for Honor."

Romans 3:2:

> I am ashamed the law is such an ass."

• • •

Opposition

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No. 81-2088

In the Supreme Court of the United States

OCTOBER TERM, 1982

BIAGIO PINTO AKA BOB PINTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had the power to remand for possible resentencing of petitioner on the surviving count of a multi-count indictment after it had reversed his conviction on another count.

2. Whether petitioner's false statements to a federally insured bank were made in connection with an "advance" within the meaning of 18 U.S.C. 1014.

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BIAGIO PINTO AKA BOB PINTO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals affirming petitioner's resentencing (Pet. App. A1–A2) is not reported. The initial opinion of the court of appeals is reported at 646 F.2d 833.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1982. A petition for rehearing was denied on April 16, 1982 (Pet. App. A3–A4). The petition for a writ of certiorari was filed on May 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of bank larceny, in violation of 18 U.S.C. 2113(b) (Count One), and one count of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014 (Count Two).[1] He was sentenced to five years' imprisonment on Count One and placed on five years' probation on Count Two. The court of appeals reversed the conviction on Count One, finding that petitioner's conduct lay outside the scope of activity proscribed by 18 U.S.C. 2113(b). The court of appeals affirmed the conviction on Count Two, however, and remanded the case with respect to the sentence on that count (646 F.2d at 838). This Court denied certiorari. No. 454 U.S. 816 (1981).

On remand, the district court resentenced petitioner on Count Two to a term of two years' imprisonment and a $5,000 fine (Sent. App. 83A; see Pet. App. A5–A14).[2] The court of appeals affirmed (Pet. App. A1–A2).

1. The trial evidence showed that petitioner was president of Pinto Trucking Service, Inc. (Trucking). Between 1972 and 1974, Trucking conducted business

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[1] Petitioner was acquitted on a third count, which charged fraud under 18 U.S.C. 1343. This was petitioner's second trial; the trial judge had set aside the verdict in the first trial, in which petitioner had been found guilty on all three counts, because the jury had considered extraneous material. (646 F.2d at 834 n.1).

[2] "Sent. App." refers to the Appendix filed by petitioner in the court of appeals on the appeal from the resentencing. "App." and "Supp. App." refer to the Appendix and Supplemental Appendix, respectively, filed in the court of appeals on petitioner's first appeal.

with a Japanese Company, Nissin Unyu Soko (Nissin), totalling about $15,000 for the entire period (App. 47A–51A, 177A–178A, 323A).

On June 5, 1974, Nissin instructed its bank in Japan, the Sanwa Bank Limited, to remit $193.51 to Trucking. Sanwa Bank did so by sending a telex communication to its American correspondent bank, Philadelphia National Bank (PNB) (App. 116A–118A; Supp. App. 37A). In processing the telex from Sanwa Bank, however, PNB mistakenly interpreted the telex as a transmission of $193,511. Accordingly, $193,511 was charged to Sanwa Bank's account at PNB, and PNB contacted Trucking to determine how the money was to be handled (App. 58A–60A; Supp. App. 18A). Trucking, through its comptroller, instructed PNB to deposit the funds in Trucking's account at First Pennsylvania Banking and Trust Company, which PNB did (App. 60A–61A).

Because Trucking's comptroller was unable to document such a large receivable, he asked petitioner about it. Petitioner said the funds belonged to him, and he told the comptroller to put the money into an account comprising funds either due to petitioner from the company or due from petitioner to the company (App. 191A–192A, 196A–197A). Thereafter, petitioner directed that funds from that account be used to pay Trucking's creditors. Within 30 days, the entire $193,511 had been dissipated (App. 200A–201A).

By late September 1974, after some routine communications between PNB and Sanwa Bank concerning the discrepancies in their records, the original error was discovered. PNB immediately notified Trucking and demanded repayment of the difference (App.

74A–80A; Supp. App. 20A, 22A). On September 27, 1974, an independent auditor for Trucking called PNB to report that petitioner had assured him that Trucking had invoices for the $193,511 and that Trucking was entitled to the money (App. 81A–82A, 370A–372A). PNB again verified the telex mistake with Sanwa Bank, sent copies of the verification to Trucking's attorney, and again demanded repayment. Trucking's attorney nevertheless responded that Trucking still believed that it was entitled to the funds (App. 84A–88A; Supp. App. 27A). At a meeting with a loan officer from First Pennsylvania on October 2, 1974, petitioner again insisted that the Japanese firm owed Trucking the entire $193,511 (App. 152A–159A; Supp. App. 145A).

2. At the conclusion of the trial, petitioner was convicted on two counts. He was sentenced to five years' imprisonment on the bank larceny count. After the court of appeals vacated his larceny conviction, only the term of probation remained. Accordingly, the court of appeals remanded the false statement count so that the district court could entertain a motion by the government to resentence petitioner on that count (646 F.2d at 838).

The government applied for resentencing and, after hearing argument, the district court concluded that there was no constitutional or statutory impediment to increasing petitioner's sentence on the false statement count so that his punishment would be more in accord with the original sentence imposed by the district court before the conviction on the larceny count was vacated (Sent. App. 67A–70A; Pet. App. A7–A8). The court explained that its sentencing plan on the two interdepend-

ent counts had been disturbed by the unanticipated reversal of the larceny conviction (Sent. App. 74A–75A; Pet. App. A11–A12). Because, in the court's view, probation alone was inadequate punishment for the "reprehensible course of conduct" (Sent. App. 74A; Pet. App. A12) engaged in by petitioner, the court resentenced him on the false statement count to two years' imprisonment and a $5,000 fine (Sent. App. 83A). Relying on this Court's decision in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), and its own decision in *United States* v. *Busic*, 639 F.2d 940, cert. denied, 452 U.S. 918 (1981), the court of appeals affirmed (Pet. App. A1–A2).

ARGUMENT

1. Petitioner contends (Pet. 10–19) that the district court lacked the power to increase his sentence on the false statement count to compensate partially for the effect of the unanticipated vacation of the sentence on the bank larceny count. He argues that the court's action violated the Double Jeopardy and Due Process Clauses of the Fifth Amendment and Rule 35, Fed. R. Crim. P. These contentions are without merit.

a. The Double Jeopardy Clause has been described as providing three separate constitutional protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Plainly, because no reprosecution is involved, the resentencing here does not implicate the first two protections. Nor does it con-

stitute multiple punishment. Petitioner is only being punished once for his violation of 18 U.S.C. 1014, according to the terms of the resentencing, and, unlike the situation in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), the total sentence imposed upon him does not exceed the limits set by the statute. See *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 720; cf. *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 688 (1980). As the Third Circuit concluded in *United States* v. *Busic*, 639 F.2d 940, 947–948, cert. denied, 452 U.S. 918 (1981): "There is nothing in the history or the policy of the Double Jeopardy Clause that justifies the denial of resentencing when the sentence has been spread erroneously over counts that have been declared invalid."

Petitioner does not seriously take issue with this conclusion. Rather, he argues that the Court should grant certiorari here in order to resolve a conflict between the decision below and the decisions of "every court of appeals in the country" (Pet. 10). In view of recent developments in the area of double jeopardy law, however, we believe there is no need for the Court now to undertake to consider this issue. All of the cases upon which petitioner relies were decided before this Court's recent decision in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), which strongly supports the constitutionality of petitioner's resentencing.[3]

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[3] Indeed, even before *DiFrancesco* was decided, the authority relied on by petitioner was not as "well-settled" as he claims. Two different circuits authorized a remand for resentencing on surviving counts in light of the invalidation on appeal of sentences on some counts. See *United States* v. *Hodges*, 628 F.2d 350, 352–353 (5th Cir. 1980); *United States* v. *Moore*, 540 F.2d 1088, 1091 (D.C. Cir. 1976).

In *DiFrancesco*, the Court rejected a double jeopardy attack upon a statute that authorized the government, in certain circumstances, to seek appellate review of a sentence on the ground that it should have been more severe. See 18 U.S.C. 3576. The Court held that "the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase." 449 U.S. at 137. By the same token, the Court explained that a defendant does not have the "right to know at *any* specific moment in time what the exact limit of his punishment will turn out to be" (*ibid.*, emphasis supplied).[4] It was in light of the Court's decision in *DiFrancesco* that the Third Circuit in *Busic* reexamined its previous position and reached the conclusion on which the decision below rests. See Pet. App. A2; 639 F.2d at 949–950. As the court of appeals explained in *Busic*, when a trial court's sentencing plan is based on an aggregate conviction, reversal of one or more counts may thwart the trial court's plan because it undermines the entire structure of the interdependent sentence. A complete resentencing may therefore "reduce the possibility of disparate and irrational sentenc-

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[4] Thus, petitioner's contention (Pet. 12) that sentences are always final except in the specific situation considered in *DiFrancesco*—a statutory sentence appeal—is plainly incorrect. Moreover, to the extent the gravamen of a double jeopardy objection to an increased sentence is the impact upon the defendant's expectations, petitioner's situation is far weaker than that of DiFrancesco. Petitioner never had any reasonable expectation that he would serve a lesser sentence than the two years' imprisonment and fine ultimately imposed. He was originally sentenced to five years' imprisonment, and subsequently, at the same time that he prevailed on the appeal on the first count, the court of appeals informed him that he could be resentenced on the second count.

ing." 639 F.2d at 948. The Double Jeopardy Clause does not require the frustration of this salutary goal by the conferral upon petitioner of an undeserved windfall of a sentence that is not commensurate with his culpability.[5]

Petitioner correctly notes (Pet. 11) that, prior to *Busic*, the Third Circuit had taken the view that resentencing such as that permitted here was prohibited by the Double Jeopardy Clause. The Second Circuit also had taken this position in the past, but, on the authority of *DiFrancesco*, it has now changed its view and agrees with the Third Circuit. See *McClain* v. *United States*, No. 81–1438 (Apr. 14, 1982), petition for cert. pending, No. 81–6881 (filed June 11, 1982). Moreover, the contrary decisions of the courts of appeals upon which petitioner relies (Pet. 10–11), all of which antedated *DiFrancesco*, are premised largely upon the courts' interpretations of *Ex parte Lange*, *supra*, and *United States* v. *Benz*, 282 U.S. 304 (1931). In *DiFrancesco* (449 U.S. at 138–139), this Court clarified

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[5] Petitioner attempts (Pet. 13–15) to distinguish this case from *United States* v. *Busic*, *supra*, by arguing that he was convicted of two separate and independent offenses, unlike Busic, who received a divided sentence for a single offense, an armed assault on federal officers. Any distinction between the two cases on that point is immaterial. While the false statement charge in this case rests on an act separate from the initial fraudulent conversion of the funds, the entire prosecution here was based on essentially one course of conduct, which happened to violate more than one criminal statute. Compare *United States* v. *Moore*, *supra* (resentencing permitted on all counts even though each count charged a separate distribution of methadone). Thus, as the court of appeals recognized here in relying on *Busic*, the reasons given in that case why the resentencing there did not violate double jeopardy and also could prevent the thwarting of the trial court's sentencing plan and promote the goal of rational sentencing are equally applicable here.

the meaning of those cases, noting that they "are not susceptible of general application" and confining them "to *Lange*'s specific context," where the defendant received a greater sentence than the legislature had authorized. These developments suggest that other courts of appeals may also reconsider their previous holdings in light of *DiFrancesco* as this issue comes before them again, and therefore that the apparent conflict relied upon by petitioner between this case and pre-*DiFrancesco* decisions may not persist. Certainly it cannot be considered a live conflict at the present time.

Finally, the district court here alternatively held that, because petitioner's probationary sentence on the second count was not scheduled to begin until service of the first sentence had been completed, petitioner had not yet begun to serve his original sentence when he was sentenced on the second count (Pet. App. A9–A11, A13–A14). Even prior to *DiFrancesco*, it had long been recognized that the Double Jeopardy Clause does not prohibit an increase in sentence by the trial court before the defendant has begun to serve the sentence. *United States* v. *DiFrancesco*, *supra*, 449 U.S. at 134. See, *e.g.*, *United States* v. *DiLorenzo*, 429 F.2d 216, 220–221 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971). Thus, even apart from the fact that the resentencing here did not increase petitioner's total sentence and was only to mitigate the effect of the unanticipated invalidation of part of the original sentence, the resentencing does not violate double jeopardy. In short, the decision below is correct, and it does

not create a conflict in the courts of appeals that warrants resolution by this Court at this time.

b. Contrary to petitioner's contention (Pet. 16–17), the resentencing here in no way violates the due process principles laid down in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). *Pearce* established that a sentence may not be increased on retrial if the increase is the result of "vindictiveness against a defendant for having successfully attacked his first conviction * * *." *Id.* at 725. But "[a] trial judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's [situation]." *Id.* at 723. To ensure that vindictiveness is not the reason for the increased sentence, *Pearce* requires the judge to specify on the record the new information that has caused him to impose a harsher penalty. *Id.* at 726.

Clearly, the resentencing here was not motivated by vindictiveness and does not violate due process. First, the resentencing was authorized by the court of appeals, which had no cause to respond vindictively to petitioner's appeal. In addition, the trial judge stated in detail his reasons for resentencing, *viz.*, that probation was not a sufficient punishment for petitioner's "reprehensible" conduct and that the intervening court of appeals decision reversing the count on which petitioner had been sentenced to imprisonment necessitated re-

sentencing on the surviving count.[6] While this post-original-sentencing event did not concern "conduct on the part of the defendant" as specified in *Pearce* (395 U.S. at 726), the trial court's statement of reasons clearly showed that vindictiveness played no part in the resentencing; the specific requirement of *Pearce* that a higher sentence be based on conduct by the defendant plainly has no application here because petitioner's ultimate sentence is undeniably less harsh than his original

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[6] The district court stated its reasons for modifying petitioner's sentence as follows (Pet. App. A11–A12; citation omitted):

> My reasons for doing so are related to circumstances unknown to me at the time I imposed probation; namely, that the count upon which I imposed a sentence of imprisonment could not support a conviction as a matter of law. The imposition of an increased sentence for this reason does not offend due process.
>
> It is perhaps misleading to refer to the sentence I am now imposing on Count 2 as "increased." It is unquestionably harsher than the probation previously imposed on this count, but it is no stricter than the complete sentence imposed before the defendant appealed his case. In reality, this is not a harsher sentencing at all. The defendant engaged in a reprehensible course of conduct, the proof of which led a jury to convict him on two counts of an indictment. I determined that his culpable conduct warranted the imposition of a five-year prison sentence and a period of probation. I refer the parties to the detailed reasons I stated in open court on September 8, 1980, at the time that sentencing in support of the five-year prison sentence was imposed.
>
> By sheer happenstance, in implementing the planned sentence, I imposed the imprisonment term of my sentence on the count that was eventually reversed. It was my intention to impose the interdependent sentences on Counts 1 and 2 as stated in the written sentencing order. Our Court of Appeals has recognized that when the District Court imposes interdependent sentences on a multi-count conviction as part of a sentencing plan, a reversal of the conviction on a single count will disturb the plan the District Court intended to follow, and therefore, resentencing is appropriate.

aggregate sentence.[7] He was not punished for appealing his conviction. Rather, he is in a better position now than he was before he took his appeal, and there can be no credible claim of a denial of due process.

c. Petitioner's contention (Pet. 17–19) that the district court's action violated Rule 35, Fed. R. Crim. P., is wholly without foundation. Rule 35(a) permits correction of an illegal sentence at any time and reduction of a sentence within certain specified time limitations. Nothing in the rule purports to restrict the power of the district court to act pursuant to a remand from the court of appeals. Here, the court of appeals specifically "remanded as to the sentence on Count 2 so that the prosecution [could] apply to the district court for resentencing on that count, in light of the reversal of the conviction and sentence on Count 1." 646 F.2d at 838. This action clearly was within that court's statutory power under 28 U.S.C. 2106 to enter any appropriate order in disposing of an appeal. See, *e.g.*, *McClain* v. *United States*, 643 F.2d 911, 914 (2d Cir.), cert. denied, 452 U.S. 919 (1981), on appeal from remand, No. 81–1438 (2d Cir. Apr. 14, 1982), slip op. 2205–2206, petition for cert. pending, No. 81–6881 (filed June 11, 1982); *United States* v. *Hodges*, 628 F.2d 350, 353 (5th Cir. 1980); *Johnson* v. *United States*, 619 F.2d 366, 368–369 (5th Cir. 1980). Rule 35 does not prohibit the district court from imposing a new sentence in light of the court of appeals' directions on remand.[8]

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[7] Although we know of no formula for equating fines with years of imprisonment, there can be little doubt that a five-year term of imprisonment is a greater punishment than is a two-year term plus a $5,000 fine.

[8] Neither case on which petitioner relies (Pet. 18) aids his cause. In *Pugliese* v. *United States*, 353 F.2d 514 (1st Cir. 1965), the court of appeals emphasized that it had not remanded

2. Petitioner also contends (Pet. 19–21) that the transmission of funds to Trucking's account at First Pennsylvania Bank was not an "advance" within the meaning of 18 U.S.C. 1014. He claims that this statute was intended to apply only to transactions involving consensual extensions of credit by federal agencies or by institutions insured by federal agencies. This contention was correctly rejected by the court of appeals on petitioner's first appeal.

As the court of appeals observed in its first opinion, the term "advance" in 18 U.S.C. 1014 has nowhere been specifically defined. However, the statute's use of the term "advance" in addition to the word "loan" implies that the former has some additional meaning beyond that of "loan" (646 F.2d at 838). When enacting Section 1014, Congress intended that the language used in the statute would be given its common and accepted meaning. *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). Among the many common meanings attributed to the word "advance" is that of "furnishing money or goods for others in expectation of reimbursement." *Black's Law Dictionary* 72 (rev. 4th ed. 1978). Here, PNB furnished money to Trucking's account at First Pennsylvania Bank, for Sanwa Bank, in expectation of reimbursement by Sanwa Bank. Indeed,

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the affirmed convictions to the district court for resentencing. Hence, the district court was acting on its own and the resentencing exceeded its power, as opposed to power that could be delegated to it by the court of appeals. *Id.* at 516. To the extent *United States* v. *Welty*, 426 F.2d 615 (3d Cir. 1970), is contrary to the decision below, it was explicitly overruled by the Third Circuit in *United States* v. *Busic*, *supra*, 639 F.2d at 953 n.14.

before PNB deposited the money in First Pennsylvania Bank, it put a hold on Sanwa Bank's PNB account to obtain immediate reimbursement. When PNB eventually had to refund the excess money to Sanwa Bank, it still retained an expectation of reimbursement from Trucking.

This Court's recent decision in *Williams* v. *United States*, No. 80–2116 (June 29, 1982), is of no application here. The court there held that 18 U.S.C. 1014 does not reach "check kiting." The basis for this holding was that a bad check is not a "false statement" within the meaning of 18 U.S.C. 1014; the Court did not address the meaning of the term "advance" in the statute. The fact that *Williams* is consistent with the decision below is manifested by the Third Circuit's own case law. During the interval between the two appellate decisions in this case, the Third Circuit on its own reached the same conclusion that this Court did in *Williams*—that "check kiting" was not covered by 18 U.S.C. 1014, *United States* v. *Sher*, 657 F.2d 28 (1981), cert. denied, No. 81–1047 (July 2, 1982). Yet it found no inconsistency between that conclusion and the decision in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-2088

IN THE

Supreme Court of the United States

October Term, 1982

BIAGIO PINTO, a/k/a BOB PINTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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No. 81-2088

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

BIAGIO PINTO, aka BOB PINTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

Because of the Government's inadequate response to the cluster of questions concerning the sentence imposed on petitioner, and because of the Government's blatant misreading of *Williams v. United States*, 50 U. S. LAW WEEK 4949 (No. 80-2116, decided June 29, 1982), a short reply is necessary.

1. The Government concedes, as it must, that the decision of the court below is in conflict with the decisions of every other court of appeals in the country. The Government asserts, however, that the disagreement is not

a "live conflict." (Brief in Opposition p. 9). The division of conflicts among the circuits into "live" and "dead" is a grievous misunderstanding of the role of this Court as the final, authoritative institution in the interpretation of the Constitution and laws of the United States.

Implicit in the Government's argument is the view that it is acceptable to allow this petitioner to suffer the injury of an unconstitutional sentence while the lower federal courts give further thought to the issues raised. Petitioner is the first defendant in a federal criminal case to receive an increase in the sentence on a surviving count following reversal on appeal of one of two separate and independent offenses, and to have that increase in sentence affirmed by the court of appeals. At stake in the constitutional questions presented are petitioner's liberty and property. Given the immediacy of those interests, it is intolerable to say that the conflict is not yet "live."

Moreover, the Government's recommendation that this Court defer action violates the obvious imperatives of sound judicial administration. The Government cannot and does not contend that further adjudication by lower courts will illuminate the principles for decision. The Brief in Opposition is largely a brief on the merits. Indeed, two years ago, the Solicitor General asked this Court to rule on the matter. *Busic v. United States*, 446 U. S. 398, 412 n. 19 (1980).

The issues are fully drawn and ready for determination. As noted in the Petition and Brief in Opposition, the parties sharply disagree about the application of this Court's decision in *United States v. DiFrancesco*, 449 U. S. 117 (1980). This Court properly acted to review 18 U. S. C. 3575 and 3576 in the first case to arise when the power of sentence review, created by that statute, was exercised.

Sentences are the heart of the criminal process. The Third Circuit has turned loose an heretical view that is capable of doing grave mischief in untold numbers of cases. It is very common to have defendants charged and convicted of two or more separate and independent crimes. Courts should be instructed promptly if, as petitioner contends, the position of the court below violates the Constitution. Defendants and their counsel need to know now how to determine whether to appeal from less than all of the counts on which they have been convicted. A trap was sprung on petitioner when he took an appeal from the conviction on which the final sentence was an order of probation. The present uncertainty poses an intolerable chill on defendants' right to appeal. The Government's insensitivity to the urgency of these questions for the sake of effective judicial administration is beyond explanation.

The Government utterly ignored the distinction between this case and *McClain v. United States*, petition for certiorari pending, No. 81-6881. *McClain* presents the question of the validity of increase on the surviving conviction where the two offenses are legally interdependent. The Second Circuit explicitly did not reach the question presented by this case, where the two offenses are separate and independent. (See Petition at p. 14). The Government is plainly in error in citing *McClain* for the view that the Second Circuit has changed its view of the Constitution and now agrees with the Third Circuit. (Brief in Opposition p. 8). No court of appeals has even suggested that it would depart from the well-settled law of finality of sentences on separate and independent offenses.[1]

1. The Government commits the same error in citing two cases in which a court of appeals remanded for resentencing on surviving counts. (Brief in Opposition p. 6, n. 3). Both cases involved legally interdependent offenses. *United States v. Hodges*, 628 F. 2d 350 (5th Cir. 1980), involved multiple counts under the

Petitioner submits that the conflict among the courts of appeals is "live" indeed. The court below has drastically altered the law of finality of sentences. The importance of that departure to the administration of criminal justice, to untold numbers of defendants, and to this petitioner is manifest. The Government has no valid argument for any delay in the resolution of these questions by this Court.

2. On the merits of petitioner's conviction of a violation of 18 U. S. C. 1014, the Government distorts and understates the significance of this Court's decision in *Williams v. United States, supra.* Contrary to the stance of the Government, this Court's decision in *Williams* constituted a broad and deep consideration of the scope and purpose of that provision. The thoroughness of this Court's treatment is apparent from the opinion of the Court and the two separate opinions. This Court's interpretation of section 1014 has major significance for validity of the conviction of petitioner.

The Court's decision and rationale are plainly not limited to the particular circumstance of a check kiting scheme. The opinion of the Court, by Justice Blackmun, was expressly conscious of the broad range of conduct that could be brought within the ambit of this federal statute. 50 U. S. LAW WEEK at 4951. The Court was influenced by its study of the legislative history of the section. *Id.* at 4952. The Court found that:

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1. (Cont'd.)

bank robbery statute which merged into a single offense. *United States v. Moore,* 540 F. 2d 1088 (D. C. Cir. 1976), was a 22-count conviction for dispensation of methadone; the multiplicity of counts was based upon evidence of 22 distributees. When the court of appeals concluded that the indictment was insufficient as to eight counts, it remanded for resentencing on the remainder.

> at no point [in that history] was it suggested that the statute should be applicable to anything other than representations made in connection with conventional loan or related transactions. (Id. at 4952).

This finding is reflected, of course, in the title of section 1014.

Justice Marshall, writing the dissenting opinion, concurred in reading the position of the majority as "limiting the statute's application to formal loan transactions." *Id.* at 4956. There was no doubt among either the majority or the dissenters that Williams' conviction was being reversed because section 1014 was held to apply only to conventional loan and credit transactions.

The dissenters, of course, urged a different reading of the statute, so that it would reach any intentionally fraudulent scheme to injure a federally insured institution. The rationale of the dissenting opinion is exactly the same as that adopted by the court of appeals below in this case. Indeed, Justice Marshall twice cites the court of appeals' opinion and quotes the key language from it in his own opinion. *Id.* at 4953, 4956 n. 5. Plainly, the rationale on which petitioner's conviction was affirmed was explicitly and directly rejected by this Court in *Williams*. The Government's argument that *Williams* has no significance for petitioner's conviction is manifestly wrong.

Moreover, it is pertinent to note that petitioner's conduct would not violate section 1014 even under the broader reading of that provision by the dissenting Justices, who stressed the intentionally fraudulent conduct of Williams in the check kiting scheme: the whole aim of the scheme was to induce the banks to extend immediate credit. In this case, by contrast, petitioner took no action whatsoever to induce the Philadelphia National Bank to

extend credit to him. It is undenied that the bank transmitted funds to petitioner solely as a result of its own unilateral mistake. Unlike Williams, whose check kiting scheme was designed and executed with intent to injure the victim banks, petitioner Pinto never took any action to obtain credit from the Philadelphia National Bank.[2] Thus, even on the dissenting Justices' broader view of the scope of section 1014, petitioner's conviction is improper.

The Government cites the Third Circuit decision in *United States v. Sher*, 657 F. 2d 28 (3d Cir. 1981), striking down a check kiting conviction under section 1014, as indication that petitioner's conviction, affirmed by a different panel of that Circuit before the *Sher* decision, is not inconsistent with *Williams*. The short and conclusive answer to the Government's contention is that both panels acted before this Court's decision in *Williams*. The extremely short opinion in *Sher* gives little guidance as to that panel's analysis of the statute. Now that this Court has addressed section 1014 in *Williams* case, the error of the court below in upholding petitioner's conviction is manifest.

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2. The Philadelphia National Bank did not enter into a credit transaction with petitioner when it transmitted funds. As the Government correctly notes in the Brief in Opposition (pp. 13-14), before the Philadelphia National Bank made the transmittal it had already placed a "hold" on the account of the Japanese bank instructing the transfer, to "obtain immediate reimbursement". The Government contention that the Philadelphia Bank extended credit to the Japanese bank is plainly wrong. But, even if the Philadelphia Bank had extended credit to the instructing bank, that would not be an extension of credit to petitioner. Since only petitioner is charged with violating section 1014, it is legal nonsense to refer to credit that might have been extended to an unrelated party.

CONCLUSION

The petition for writ of certiorari should be granted. Summary reversal should be ordered on the basis of *Williams v. United States, supra.* If summary reversal is not ordered, the case should be set down for plenary consideration.

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